> "You must take these facts and consider them. I do not say that you are bound to find that he was dishonest, but there is evidence from which you could so find. What is a man who is a contractor doing, going round and borrowing $100 from this woman and $200 from another woman and again from another whom he names Mrs. Keh Wah? He is a man of business. He does not say they are professional money lenders."

Taking the passage as a whole the learned judge tells the jury that in his opinion the borrowing of money from these Chinese women in the first place was dishonest, and from that the jury are invited to conclude that the tearing up of the I.O.U. was dishonest. Again the jury are not warned that the original borrowing may not have been dishonest at all, and if so the original dishonesty was quite irrelevant to the proof of *mens rea* in the tearing up of the document.

Again in his address to the jury the accused, who appeared in person at the trial, emphasized the improbabilities of the prosecution case. In particular he says:—

> "I would not be so idiotic as to tear up that document and throw it on the floor so that they would be able to get hold of it again, and so have proof to bring a case against me. If I had the intention to destroy it, I would have torn it up and thrown certain portions away."

The substance of this argument was never put to the jury in the summing up, and in fact the whole defence is dismissed in a couple of sentences.

In considering these various matters the Court do not consider that they should dismiss the appeal on the ground that notwithstanding these objections there has in fact been no miscarriage of justice. It may well be that the jury accepted the view of the facts put forward by the learned judge without considering that the decision rested with them, and not with him. In the same way they may have thought that a dishonest intention could be inferred for reasons irrelevant to the consideration of the actual facts before them, and in the result may have found a verdict which otherwise they might not have found.

In the opinion of the Court therefore the appeal should be allowed, the conviction quashed and the sentence set aside.

Appeal allowed.
Conviction quashed.

[ORIGINAL CIVIL JURISDICTION]
GORDON-SMITH, J.
July 9, 1937.

IN THE MATTER OF THE ESTATE OF CHOONG CHENG KEAN DECEASED. CHOONG ENG POH AND CHOONG ENG KHIN (INFANTS) BY THEIR NEXT FRIEND TAN CHOO LIANG (WIDOW).

vs.

LIM GAIK KEE NEOH, CHOONG LYE HOCK AND CHOONG LYE HIN.

[PENANG ORIGINATING SUMMONS No. 4 of 1937]

Will — construction — legacy contingent on legatee surviving date of distribution—death of legatee—gift over—division of legacy amongst legatee's widow and issue—payment to issue on attaining twenty-one—vesting.

A Chinese testator after making divers bequests and providing for the management of his family house and businesses and for monthly allowances to certain beneficiaries, gave the residue to his trustees upon trust to distribute this residue at the expiration of twenty years from his death, as to a sum of $100,000/- thereof to one of his sons C. L. T., contingently on his surviving the date of distribution and as to the balance to his two other sons; if C. L. T. should die before the date of distribution, the legacy as to one-fifth to go to his widow and as to the remaining four-fifths to any one of his issue, such share of the legacy to become payable on their attaining majority. The testator also directed the trustees "in the meantime" to pay a monthly allowance of $200/- to C. L. T.'s widow for the maintenance of herself and her children. C. L. T. died before the date of distribution, leaving a widow and two infant sons. In 1936 his widow received her share of the legacy.

Held, on the proper construction of the Will, that the portion of the legacy given to C. L. T.'s two sons vested in them at the expiration of twenty years from the testator's death but that it is subject to divestment, if the issue does not attain twenty-one years, on which event it will become payable, if both sons survive that event, to them in equal shares; if only one survives, the whole goes to the survivor.

Held further, that "in the meantime" refers to the period of twenty years from the testator's death and that the sons of C. L. T. were entitled to interest on their share of the legacy from the date of vesting of such share, but not to both interest and maintenance.

ORIGINATING SUMMONS.

Hogan for the Plaintiffs.

Ross (*Lee Hong Teik* with him) for the defendants.

The questions propounded for determination by the Court sufficiently appear from the judgment below.

Cur. Ad. Vult.

GORDON-SMITH, J.—The main question arising on this Originating Summons is contained in Prayer 3, as follows:—That it may be determined whether upon the true construction of the Testator's said will and codicil, the balance trust legacy of $76,000/- has already vested in the said Plaintiffs in the events which have happened, or whether the same will only vest in the said Plaintiffs upon their respectively attaining the age of 21 years.

Choong Cheng Kean deceased (hereinafter referred to as the Testator) made his will dated the 7th June 1916 but by a codicil dated the 20th June 1916 revoked Clause 17 thereof and substituted a new clause. He died on the 23rd June 1916 and the will and codicil were duly proved by the defendants, the Executors and Trustees therein appointed, on the 16th November 1916.

The female defendant is a widow of the Testator and the other two defendants are sons. The Plaintiffs are infants and apply through their mother, a widowed daughter-in-law of the Testator, in respect of a legacy bequeathed by Clause 17 of the Will, *i.e.* the Codicil. They are the sons of Choong Lye Teong, another son of the Testator, who survived the Testator but who did not survive the date of distribution, hereinafter referred to.

By his will, the Testator gave various legacies to his widows and concubines and made provisions for the carrying on of his family house and businesses and for monthly allowances pending the distribution of his estate. The Court is not concerned with these provisions and, I understand, that there is no dispute as to the estate having been properly administered by the Trustees hitherto, but there is now a dispute as to the proper interpretation to be placed upon Clause 17 in view of the events which have happened. It is not disputed that the son Choong Lye Teong died before the date of distribution of the estate, which, it is also agreed is the 23rd June 1936. Nor is it disputed that the infant Plaintiffs are his two sons, aged respectively 13 and 11 years.

The relevant portions of Clause 17 of the Will are as follows:—

The Testator devised and bequeathed all the rest and residue of his estate elsewhere than in China unto his Trustees Upon Trust at the expiration of twenty years computed from his death

> "to pay to my son Choong Lye Teong *if he shall then be living* the sum of Dollars One hundred thousand ($100,000/-) and to divide the balance equally between my two sons the said Choong Lye Hock and Choong Lye Hin"

then follow provisions in regard to this gift of the balance of residue to these two sons: It then proceeds

> "*Provided also* that if my son the said Choong Lye Teong shall die before the date of distribution *and if at such date* there are lawful issue living by him *then and in such case* my trustees shall out of the legacy hereinbefore contingently bequeathed to him pay to his lawful widow subject to her remaining his widow and leading a chaste life one-fifth of same *and divide the remaining four-fifths among his lawful issue* in the proportion of one (1) share to each daughter and three (3) shares to each son *provided that no payment shall be made* to any son or daughter of the said Choong Lye Teong *unless and until* he or she attains the age of twenty-one (21) years. *And in case* any such son or daughter shall die before attaining the age of twenty-one (21) years the share of such son or daughter so dying shall belong to and divided amongst such of the sons or daughters as survive and attain twenty-one (21) years in the proportion aforesaid. *And in the meantime* I direct my trustees to pay to such widow the sum of Dollars two hundred ($200/-) per month for the maintenance of herself and children."

Then follow provisions in case the son Choong Lye Teong died leaving no issue or with or without leaving a widow the eventual result in such case being that there was a gift over of the legacy to the Testator's two other sons.

Summarising this clause briefly, and, *prima facie*, the Testator bequeaths the residue of his estate to his Trustees upon trust to distribute this residue upon the expiration of 20 years from his death, as to $100,000/- thereof to one son, contingently upon his surviving the date of distribution and as to the balance of such residue to his two other sons. Provison is made for the contingency, which has happened, namely the death of the one son before the date of distribution. In such event, the legacy as to one-fifth is to go to the deceased son's widow, and as to the remaining 4/5ths to any of his son's issue. There is issue, namely the two plaintiffs—but the Testator postpones the date of payment of this 4/5ths to this issue until they attain their majority. There is also provision for the total or partial failure of this issue to attain the age of 21 years.

I might perhaps here mention that the widow, in Originating Summons 100/1936, obtained an order for payment of her 1/5th share of this legacy which has been paid to her.

It is not disputed that the original gift to Choong Lye Teong was contingent and did not vest, and it is argued, for the Trustees that, similarly, the gift over to the issue is contingent and does not vest until the children attain 21. For the children it is argued that, having survived the date of distribution, the gift to them has vested in them but they are liable to be divested of it in the event of their not attaining the requisite age of 21 years which is the postponed date of payment to them of their shares. This is the first and major point for decision. Firstly, as to the paramount intention of the Testator, to be gathered from the contents of the will. In this connection I might quote the remark of Lord Lindley in *In re Williams*, (1897) 2 Ch:D p.

14, "When I see an intention clearly expressed in a Will and find no rule of law opposed to giving effect to it, I disregard previous cases."

The intentions in the Will are obvious. In the first place the Testator desires to postpone the dissolution and distribution of the residue of his estate for as long, or nearly as long, as the law allows and in the meantime authorises his Trustees to carry on and continue any of his businesses. He fixes a date for the distribution of this residue which he bequeaths to his Trustees Upon Trust to distribute it at the date mentioned. One of his sons is given a large legacy out of it but in case this son does not survive the date of distribution then he desires this son's issue (if any) to have their deceased parent's share, subject to a proportion going to the widow, (if any), but he tacks on a wise provision that the actual payment to the son's issue shall not be made during minority. There is a widow and there is issue, namely two sons. Supposing these two sons themselves married and had issue, but died before attaining 21. This contingency is not provided for, but it is quite possible and if the argument for the Trustees succeeds and such events happened, the son's issue would apparently get nothing. However there is nothing in the Will on this point and in view of my finding, I need not consider the possibility of such happenings.

The question is, has the legacy vested in the 2 sons, subject to divestment? In this respect and in view of the arguments thereon, it is necessary to look at clause 17 in greater detail in order to see whether the legacy of the $100,000/- has become vested in some person or other. "The only definition that can be given of the word 'vested' in English Law as applied to future interests, other than remainders, is, that it means, 'not subject to a condition precedent': What amounts to a condition precedent, the cases only can determine" see *Hawkins* on Wills, p. 265 and to quote *Jarman* on Wills 7th Edition, Vol. 2 on this point at p. 1373. With regard to the vesting of personal legacies, the payment of which is postponed to a period subsequent to the death of the Testator, Mr. Jarman states the general rule as follows:—'A leading distinction is, that if futurity is annexed to the substance of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests *instanter*. Thus, where a sum of money is bequeathed to a person at the age of 21 years, or at the expiration of a definite period (say ten years) from the decease of the testator, the vesting, not the payment merely, is deferred; and, consequently, if the legatee dies before the period in question, the legacy fails. But if the legacy is, in the first instance, given to the legatee, and is then directed to be paid at the age of 21 years, or at the end of ten years, after the testator's decease, the legacy vests immediately, so that in the event of the legatee dying before the time of payment, it devolves to the representative."

Now if one turns to Clause 17 of the Will, one will see that there is an example of both a contingent and vested legacy, in regard to the $100,000/-. The residue of the estate is devised and bequeathed to the Trustees Upon Trust, at the expiration of 20 years from the Testator's death to pay a legacy to the son Choong Lye Teong, *if he shall then be living*. Here we have a condition precedent that the son must survive the 20 years. If he did not so survive then the legacy fails and under the Will, there is a gift over. In fact, he did not survive and it is not disputed that his legacy was contingent and did not vest in him. As to the gift over which is in express terms "and if at such date" (i.e. the expiration of 20 years) "there are lawful issue living by him then and in such case my trustees shall out of the legacy hereinbefore contingently bequeathed to him, pay" etc. etc. That is to say, the son's widow is to be paid one-fifth of such legacy and the issue the remaining 4/5ths in due proportions. It is then, and subsequently to the gift, that there is a proviso that no payment is to be made to the issue until they attain majority, but the payment at 21 is not a condition precedent to the gift but a condition subsequent and does not affect the actual gift. In support of this, I would again draw attention to the fact that the widow has already received her 1/5th share under an Order of Court. So that it cannot be denied that her share not only vested in her at the expiration of the 20 years but was immediately payable. And why should not the other 4/5ths vest in the issue, altho' not immediately payable. To quote *Hawkins* on Wills again, p. 268. "A bequest to A at 21 and a bequest to A payable at 21, do not much differ in expression; yet one is vested, the other a contingent gift; for it is a rule of construction that in bequests of personal estate, if the gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting." [*Bartholomew's Trusts*, 1 Mac. and G. 354; *Lister* v. *Bradley*, 1 Hare 10]. This also confirms the extract I have already quoted from *Jarman* on Wills, Vol. II p. 1373. This seems to me to be also the clear intention of the Testator.

I hold therefore that the 4/5th of the legacy of $100,000/- vested in the issue living at the date of the expiration of the 20 years from the testator's death, i.e., the 23rd June 1936, but that it is subject to divestment if the issue does not attain 21 years, on which event it will become payable, if both the Plaintiffs survive that event, to them in equal shares; if only one survives, the whole goes to that survivor.

This does not dispose of the whole matter. The Testator in the latter part of this Clause 17 and following on this legacy directs the payment of maintenance as follows: " And in the meantime I direct my trustees to pay to such widow the sum of Dollars two hundred ($200.00) per month for the maintenance of herself and children." I have no doubt at all that " in the meantime " refers to the period of 20 years, at the expiration of which I have held that the respective shares of the legacy became vested in the widow and children. They cannot have, and do not claim, both maintenance and interest on the legacy. In fact, the widow has had her share of the legacy already. I am however satisfied on the authorities (see *Jarman* Vol. 2 pp. 1082/3) that the two infants are entitled to interest on that share of the legacy as from the 23rd June 1936, but not to both interest and maintenance.

Both questions of security and appropriation of the balance of the legacy were argued before me but I propose to postpone any ruling on these points as, the main question having been decided and, so I understand, the amount of the balance of the legacy being immediately available, the parties might very well come to terms on these two points, subject to the approval of the Court on behalf of the infant Plaintiffs. I would however suggest that this balance be paid into Court to the credit of this Originating Summons and be invested for the benefit of the two infants. This would relieve the Trustees of any responsibility in the matter either for interest or capital and it would, I believe, enable the residue of the estate to be distributed.

There will therefore be liberty to apply.

Order accordingly.

Solicitors for the plaintiffs—*Hogan, Adams & Allan.*

Solicitors for the defendants—*Logan, Ross & Samuel.*

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.